IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 3708 of 2004

1. Dr.Hemchandra Madhav Kulkarni
and another ..Petitioners

vs.

1. The State of Maharashtra
and others ..Respondents

Shri L.M.Acharya for petitioners
Shri Y.D.Mulani, A.G.P. for respondent no.1
Shri Rajiv Chavan for respondent nos.2 and 3

CORAM: A.P.SHAH
& S.U.KAMDAR JJ.
25th August,2004

P.C.

1. Rule. Shri Mulani and Shri Chavan waives service for respondent no.1 and respondent nos.2 and 3 respectively.

2. By consent, rule is made returnable forthwith.

3. This is a petition under Article 226 seeking to issue an appropriate writ, order or direction to quash and set aside the letter dated 20th February, 2001 and to issue passport to both the petitioners treating them as Indian citizens.

4. The facts of the case are as follows. The petitioner nos.1 and 2 are brothers and their

parents were Indian citizens. The petitioners' father had gone to East Africa in 1933 for employment with East African Railways which was owned by British Government. The petitioner no.1 was born in 1941 in Tanganyica in East Africa. The petitioner no.2 was born in 1949 in Shinyanga in East Africa. The petitioners' father and mother both returned to India in 1952. By that time the Passport (Entry into India) Rules, 1950 came into force requiring a person (including an Indian citizen) entering into India a valid passport issued by a commonwealth country. Both the petitioners came back to India along with their parents. They travelled on their mother's passport. It appears that the petitioners' parents were issued British passports at Dar-e-Salam but after they came back to India they did not renew the said passports. The petitioners' parents did not acquire any other domicile or citizenship nor they utilised the said passports at any time. The petitioners' parents died in Pune. The petitioners since their return to India in 1952 have been in Pune for more than five decades. The petitioner no.1 is a doctor by profession and served as a child specialist in the Hospital run by Pune Municipal Corpration. He retired on 31st March,1999. The petitioner no.2 who is an engineer

is serving in a public limited company.Both the petitioners have exercised their voting rights and are issued identity cards by the Election Commission of India. They are income tax payers and possess PAN card. Both the petitioners are permanently residing at Pune for last more than 50 years and possess ration cards. It appears that petitioner no.2 has obtained the British passport during his minority. However, it is an admitted position that the British passport was expired after one year and it was not renewed at any time thereafter.

5. These basic facts are not seriously disputed in the counter affidavit filed on behalf of the respondents. It appears that the petitioner no.2 had applied for a passport some time in the year 2000. The Regional Passport Officer, Pune however, refused to issue Indian passport on the ground that the petitioner no.2 was born outside India i.e. East Africa and asked the petitioner no.2 to apply to Ministry of Home Affairs, Government of India, New Delhi for getting himself registered as Indian citizen. Both the petitioners accordingly made an application to the Ministry of Home Affairs as per the format prescribed under the provisions of the Citizenship Act, 1955. The Under Secretary,

Ministry of Home Affairs, however, wrote back on 20th February, 2001 that registration of the petitioners as Indian citizens cannot be considered in the absence of valid residential permit authorising their stay in India as foreigners and that till then they would be treated as foreigners. However, under the stated circumstances, they may be treated as "Stateless" persons and their stay in India may be authorised provided they obtain "Identity Certificate" from the Regional Passport Officer for this purpose. It was stated that the matter of grant of Indian citizenship will be considered after receipt of valid residential permit from the State Govt. The petitioners allege that they were made to run from pillar to post although they have submitted all the documents in support of the proof of their domicile and their residence in India particularly in the State of Maharashtra but the Union of India has not taken any decision in the matter.

6. Shri Acharya, learned counsel appearing for the petitioners, has strenuously contended that the petitioners' parents continued to have Indian domicile and citizenship even during their course of overseas assignment. The mere fact that the petitioners' parents obtained a passport in East

Africa does not mean that they acquired another domicile or citizenship. Similarly, the petitioner no.2 after attaining the majority did not change his domicile. In fact, petitioner no.2 after attaining majority did not renew the British Passport and got it ultimately cancelled. Thus, the petitioners continued to be Indian domiciles.

7. The main ground urged by Shri Acharya, is based on Article 5 of the Constitution which reads as follows:

> "5. Citizenship at the commencement of the Constitution - At the commencement of this Constitution every person who has his domicile in the territory of India and - (a) who was born in the territory of India, or; (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India ."

8. The argument of Shri Acharya is that since the petitioaners' parents were Indian domicile the petitioners also acquired Indian domicile notwithstanding the fact that they were born

outside India. More over on attaining majority the petitioners did not change their Indian domicile. In fact, the petitioners have not visited any other country even after acquiring temporary or permanent domicile. The petitioners are, therefore, Indian citizens by virtue of Article 5 of the Constitution of India. The short question for determination is whether the petitioners have lost the right of Indian citizenship merely by reason of their travelling on the mother's passport or one of them acquiring British Passport during his minority. Shri Acharya drew our attention to the decision of the Constitution Bench in Kedar Pandey Vs. Narain Bikram Sah, A.I.R.1966 S.C.160 where the Court summarised the legal position as follows:

> The law attributes to every person at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, called a domicile of choice, acquired; the two kinds of domicile, however, differ in one respect. The former kind of domicile is received by operation of law at birth, while the latter kind of domicile is acquired later by the actual removal of the individual to another country

accompanied by his animus manandi. The domicile of origin of an individual is determined by the domicile, at the time of his birth, of the person upon whom he is legally dependent. A legitimate child who is born in a wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicile, any individual who is not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose residents is a mere physical fact. It means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. When this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or animus manendi, which is required demands that

> the individual should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or, in effect, he should have formed a deliberate intention to settle there. The onus of proving that a domicile has been chosen in substitution for the domicile of origin is upon those who assert that the domicil of origin has been lost. The domicil of original continues till a fixed and settled intention of abandoning the same and acquiring another as the sole domicil is clearly established."

9. Shri Acharya also referred to the decision of the Supreme Court in Govt. of Andhra Pradesh Vs. Syed Mohd.Khan, A.I.R.1962 S.C.1778 whereafter referring to its earlier decision in Izhar Ahmed Khan Vs. Union of India; AIR 1962 SC 1052, the Supreme Court made the following observations:

> Indeed, it is clear that in the course of judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the

citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question. Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that that question should be first considered by the Central Government. In dealing with the question the Central Government would undoubtedly be entitled to give effect to the impugned "R.3 in Sch.III and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of the

> Central Government about the status of the person is the basis which any further action can be taken against him."

10. We find merit in the submission of Shri Acharya. It is now well settled position that a person cannot lose or abandon his or her citizenship or acquire nationality so long he or she remains minor. (See Sharafat Ali Khan Vs. State of Uttar Pradesh and others; AIR 1960 Allahabad 637 and Mst.Allah Bandi Vs. Govt. of Union of India, AIR 1954 All 456). Therefore, the fact that the petitioner no.2 had acquired a British Passport during his minority is of no consequence as he had no legal capacity to acquire a domicile different from that of the guardian and could not in law migrate. In fact, it is an admitted position that the petitioner no.2 did not renew the passport after attaining majority and has been all along residing in India right from 1952. However, Shri Chavan urged that the petitioners' parents had acquired British Passport in 1952 and that may be construed as an intention of abandoning their citizenship. The contention is without any merit. It is clearly seen from the facts of the present case that the petitioners' parents obtained

British Passport only for the purpose of travelling back into the country of their origin. Thereafter the said passport was not used by the petitioners' parents at any time. The petitioners' parents continued to stay in India through out their life. The foreign passport was not used or renewed. In the above circumstances, on this factual background, we are inclined to accept the prayer made by the petitioners. Accordingly, we make the rule absolute in terms of prayer clauses (a) and (b). The Passport Authority is directed to issue the passport to the petitioners subject to compliance with other conditions if any.